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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 140207122-4122-01]

RIN 0648-BD97

Withdrawal of Hawaiian Islands Humpback Whale National Marine Sanctuary Proposed Regulations

AGENCY: Office of National Marine Sanctuaries (ONMS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: This action withdraws a notice of proposed rulemaking (NPRM) published in the Federal Register on March 26, 2015 (80 FR 16224), to amend the regulations for the Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS or sanctuary) and to revise the sanctuary's terms of designation and management plan.

ADDRESSES: For copies of related documents, you may obtain these through either of the following methods:

- Copies of the draft environmental impact statement and proposed rule being withdrawn can be downloaded or viewed on the internet at www.regulations.gov (search for docket "NOAA-NOS-2015-0028") or at <http://hawaiihumpbackwhale.noaa.gov>.

- Mail: Hawaiian Islands Humpback Whale National Marine Sanctuary, NOAA/DKIRC, 1845 Wasp Blvd., Bldg 176, Honolulu, HI 96818, Attn: Malia Chow, Superintendent.

FOR FURTHER INFORMATION CONTACT:

Malia Chow, Superintendent, Hawaiian Islands Humpback Whale National Marine Sanctuary at 808-725-5901 or hihwmanagementplan@noaa.gov

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulatory Background

The Hawaiian Islands Humpback Whale National Marine Sanctuary covers approximately 1,031.4 square nautical miles (1,366 square miles) of federal and state waters in the Hawaiian Islands, approximately 70% of which is in State waters. The sanctuary lies within the shallow warm waters surrounding the main Hawaiian Islands, which are a nationally significant marine environment. Congress designated the sanctuary in 1992 through the Hawaiian Islands National Marine Sanctuary Act (HINMSA, Subtitle C of the Oceans Act of 1992, Pub. L. 102–587), which declared that the purposes of the sanctuary were to: 1) protect humpback whales and their habitat; 2) educate and interpret for the public the relationship of humpback whales to the Hawaiian Islands marine environment; 3) manage human uses of the sanctuary consistent with the Act and the National Marine Sanctuaries Act (NMSA); and 4) provide for the identification of marine resources and ecosystems of national significance for possible inclusion in the sanctuary.

The sanctuary is co-managed by NOAA and the State of Hawai‘i (State) through a compact agreement signed in 1998. This agreement clarifies the relative jurisdiction, authority, and conditions of the NOAA-State partnership for managing the sanctuary. The Hawai‘i

Department of Land and Natural Resources (DLNR) serves as the lead agency for the State's co-management of the sanctuary.

As noted above, an express purpose of the HINMSA is to provide for the identification of marine resources and ecosystems of national significance for possible inclusion in the HIHWNMS. Consistent with this purpose, the 2010 sanctuary management plan review process (75 FR 40759) provided an opportunity to consider the value of marine resources and ecosystems of Hawai'i, assess existing threats and protections to these valuable resources, and determine where NOAA can provide added value to the resource management efforts provided by the State and other federal agencies.

B. Public Review Process

On July 14, 2010, NOAA formally initiated the sanctuary management plan review public scoping process by publishing a notice of intent in the Federal Register (75 FR 40759). That notice informed the public that NOAA was initiating a review of its sanctuary management plan and regulations and preparing an associated environmental impact statement (EIS). On March 20, 2015, NOAA released a draft environmental impact statement (DEIS) and draft management plan for the HIHWNMS (80 FR 15001) for public comment. On March 26, 2015, NOAA published a notice of proposed rulemaking in the Federal Register (80 FR 16223) proposing to expand the size and scope of the HIHWNMS through revisions to the existing sanctuary regulations provided at 15 CFR part 922, subpart Q.

The proposed rule would have changed the focus of the sanctuary from management of a single species (humpback whales and their habitat) to a broader, ecosystem-based management approach that applied the same definition of sanctuary resources as applies to the other 12 national marine sanctuaries. Under 15 CFR 922.3, this includes any living or non-living resource

of a National Marine Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary. The resources include but are not limited to the substratum of the area of the Sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brinseep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources. NOAA also proposed adding an additional 255 square miles to the sanctuary increasing its total area to 1,621 square miles.

The public comment period on the proposed rule and associated draft management plan and DEIS closed on June 19, 2015. NOAA received 15,337 submissions from individuals, organizations, companies and agencies. NOAA also held 11 public meetings attended by over 739 people to gather public comments. Comments received covered a range of specific issues, which included the following themes: 1) support for activities that continue to protect and help the recovery of humpback whales; 2) support for the management plan activities that were non-regulatory, and for which the sanctuary program is known, such as education and outreach; 3) support and opposition to ecosystem-based management; 4) opposition to a boundary expansion to include the waters around Niihau; 5) concerns about additional and redundant federal regulations; 6) concerns about the designation of Maunalua Bay as a Special Sanctuary Management Area; 7) support for increased funding for the Department of Land and Natural Resources; 8) questions about co-management with the State of Hawaii; and 9) questions about the need for the sanctuary in light of an increased humpback whale population. NOAA also received comments that were general in nature and not directly related to the specific aspects of the proposal. These comments expressed concerns about the federal government and state rights,

impacts on fishing rights, access restrictions to areas, and negative economic impacts. Comments also expressed a general support for continued whale conservation.

On June 19, 2015, NOAA received a letter with detailed comments from various entities within the State, including DLNR; the Department of Business, Economic Development, and Tourism's Office of Planning and Hawai'i State Energy Office; the Department of Hawaiian Home Lands; the Department of Health Environmental Health Administration; the Department of Transportation; the Natural Energy Laboratory of Hawaii Authority; the Office of Environmental Quality Control; and the Aha Moku Advisory Committee. The letter detailed the State's feedback on the proposal and included support for HIHWNMS engaging in more management activities such as outreach, research, enforcement, and planning. However, the State was not supportive of any additional federal regulations as described in the proposal. In its comments, the State expressed concerns that, in its view: 1) the proposed additional federal regulations were redundant in light of existing State regulations; 2) the proposed regulatory language was overly broad and would lead to implementation challenges; 3) the DEIS did not adequately consider current state and county regulations; and 4) the DEIS did not include adequate analysis of the economic, social, and cultural impacts of the proposal. The State recommended that the HIHWNMS should instead focus on regulatory gaps and avoid duplicating existing regulations.

The Sanctuary Advisory Council (SAC) formed a working group to evaluate the Draft Management Plan and DEIS and to provide recommendations to the SAC. At the July 20, 2015, SAC meeting in Honolulu, the council voted to support the full recommendations as formulated by the working group and forward them to sanctuary management. The SAC voted to support the transition to ecosystem-based management, and was supportive of the sanctuary's proposed work

on key issues and geographies, while recognizing the importance of co-management between NOAA and the State.

II. Basis for Withdrawing the Proposed Rule

Throughout the management plan review process and following the end of public comment period, NOAA and DLNR as co-managers engaged in a dialog to consider how to address the issues raised during the management plan review process, including the concerns from the State agencies. On January 22, 2016, NOAA received a letter from DLNR expressing concerns that expanding the HHHWNMS to an ecosystem-based sanctuary would provide a new definition of sanctuary resources that could restrict the State's ability to recover damages for violations of state laws and rules governing natural resources within the sanctuary. The State expressed support for the concept of ecosystem-based management but did not support the expanded definition of sanctuary resources in state waters. DLNR requested that HHHWNMS consider adding additional marine mammals, but not their habitat, as sanctuary resources, citing this as a way for the sanctuary to further build on its unique strengths and complement existing state functions. On January 26, 2016, NOAA responded to DLNR's letter and expressed NOAA's view that adding marine mammals without including their habitat would be inconsistent with the National Marine Sanctuaries Act. It is NOAA's view that the definition of "sanctuary resource" (16 U.S.C. 1432) does not allow NOAA to exclude habitat since habitat clearly "contributes to the value of the sanctuary." This view of the definition is consistent with the March 2015 DEIS which analyzed the proposal to expand the purpose of the national marine sanctuary.

Under the National Marine Sanctuaries Act (16 U.S.C 1434(b)(1)), and the terms of the 1998 compact agreement, the Governor of Hawai'i would have the ability to formally object to

the proposed changes to the HIIHWNMS before any change were finalized in State waters. Given the respective positions of NOAA and DLNR on the proposal, and NOAA's desire to continue effective co-management of the sanctuary with the State, NOAA has decided to withdraw this proposal in light of the Governor's likely objection. NOAA will continue to co-manage the current humpback whale-focused sanctuary with the State of Hawai'i.

III. Withdrawal

In consideration of the foregoing, NOAA hereby withdraws the NPRM for NOAA Docket No. NOAA–NOS–2015–0028, as published in the Federal Register on March 26, 2015 (80 FR 16223).

Dated: March 2, 2016.

John Armor,

Acting Director, Office of National Marine Sanctuaries.

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